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IN THE

Supreme Court of the United States

No. [redacted] 126

OCTOBER TERM 1968

BALDWIN-LIMA-HAMILTON CORPORATION; BETHLEHEM STEEL CORPORATION (as an original party and as successor by merger to Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation); BUCYRUS-ERIE COMPANY; CF&I STEEL CORPORATION (name changed from The Colorado Fuel and Iron Corporation, an original party and successor by merger to John A. Roebling's Sons Corporation); DETROIT STEEL CORPORATION; EDGEWATER STEEL COMPANY; GRANITE CITY STEEL COMPANY; GRINNELL CORPORATION (successor by merger to Columbia Malleable Castings Corporation); LUKENS STEEL COMPANY; McLOUTH STEEL CORPORATION; NATIONAL STEEL CORPORATION; PHOENIX STEEL CORPORATION (successor by merger to Phoenix Iron and Steel Company and Central Iron and Steel Company); UNITED STATES STEEL CORPORATION (with respect to its plant at Geneva, Utah); and WEIRTON STEEL COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 24, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 389 F. 2d 847. The opinions of the Federal Trade Commission ("the Commission") are reported at 62 F. T. C. 597, 649. The initial decision of the Hearing Examiner is reported at 62 F. T. C. 262.*

*This petition seeks review of the same judgment and order as the petition of Luria Brothers and Co., Inc. ("Luria") in the proceeding styled *Luria Brothers and Co. Inc.* v. *Federal Trade Commission* and is based upon and relies on the same record ("R.") and Appendix ("App.") filed therein. The initial decision of the Hearing Examiner appears at R. 2161a-2668a and has not been reprinted in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1968. Petitioners filed a petition for rehearing en banc on February 6, 1968, and that petition was denied in an order entered February 27, 1968. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

This petition presents four questions common to all petitioners:

1. Did purchasers of the same supplier violate Section 5 of the Federal Trade Commission Act by purchasing a major portion of their requirements of a vital raw material from that supplier

   (a) when decisions to purchase were made freely and independently by each purchaser,

   (b) when each purchaser was motivated solely by its satisfactory experience with the performance of that supplier, and

   (c) when the dealings with that supplier were unilaterally terminable at will by each purchaser?

2. May the purchases of each petitioner, which were entirely lawful standing alone, be declared unlawful on the theory that, in the aggregate, they may have contributed to a possible incipient monopoly?

3. May petitioners be subjected to a prospective order of the Commission in the absence of any specific finding that they violated the law simply because their inclusion in such an order was thought necessary to make the relief sought against a third person more effective?

4. May the Commission properly issue an order materially affecting petitioners' future purchasing practices solely on the basis of market conditions that existed more than 14 years ago?

STATUTES INVOLVED

Federal Trade Commission Act § 5(a)(1), 38 Stat. 719 (1914) as amended, 15 USC § 45(a)(1):

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

Clayton Act § 3, 38 Stat. 731 (1914), 15 USC § 14:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Sherman Act § 1, 26 Stat. 209 (1890) as amended, 15 USC § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

among the several States, or with foreign nations, is declared to be illegal . . . ."

Sherman Act § 2, 26 Stat. 209 (1890), 15 USC § 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

A. The Proceedings Below

The proceedings in this case were instituted by a complaint filed by the Commission on January 19, 1954, which was amended on July 13, 1954, and April 16, 1956 (R. 15a-43a). The principal evidence submitted covers the years 1945 through 1954. The record was closed in 1958. The Hearing Examiner's Initial Decision was filed on March 29, 1961 (R. 2161a-2668a), and the Commission's decision affirming was filed on November 15, 1962 (App. 40a-115a). Chairman Dixon and Commissioner Anderson constituted the majority, Commissioner Elman dissented, and Commissioners McIntyre and Higginbotham did not participate. The Commission's order was entered on February 13, 1963 (App. 116a-121a). On April 11, 1963, petitioners appealed to the United States Court of Appeals for the Third Circuit ("the court below") to review and set aside that order. The court below entered its judgment on January 24, 1968 (App. 1a-33a). On February 6, 1968, petitioners petitioned for rehearing en banc, which was denied on February 27, 1968.

B. The Petitioners

Petitioners are engaged in one form or other in the production and manufacture of steel products. Certain petitioners (Bethlehem, Phoenix, CF&I, Detroit, Granite City, McLouth, U. S. Steel and Weirton) are fully integrated steel companies, *i.e.*, they produce pig iron and also operate facilities for the production of semifinished and finished steel from ingots. Other petitioners (Edgewater and Lukens) are semi-integrated steel companies which do not operate blast furnaces but do produce ingots and have finishing facilities. Petitioners Baldwin-Lima-Hamilton, Bucyrus-Erie and Columbia Malleable operate iron or steel foundries to supply their own manufacturing and fabricating operations (App. 42a-43a).

Luria, which is filing a separate petition for certiorari, is a seller of iron and steel scrap.

Petitioners purchased scrap for use as a raw material in the production of new steel.* However, petitioners are by no means the only or even the major consumers of scrap. The Commission found that petitioners' scrap purchases represented in the aggregate only approximately 22% of the total scrap received by all domestic scrap consumers (App. 43a). Among the large integrated steel companies which also purchase scrap but which are not parties to this proceeding are Republic Steel Corporation, Jones & Laughlin Steel Corporation, The Youngstown Sheet and Tube Company, Armco Steel Corporation, Inland Steel Com-

*Most steel producers use scrap which is generated as a waste product from their own production activities and which is referred to as "home scrap". Their remaining requirements must be purchased from outside sources and is referred to as "purchased scrap". The quantity of purchased scrap which a steel producer will need is determined by a wide variety of factors including the availability of home scrap, the availability and relative cost of pig iron, the desired chemical content of the steel to be produced, the type of furnace to be charged and the level of steel production (R. 1989a-1992a).

pany, Wheeling Steel Corporation, Sharon Steel Corporation, Kaiser Steel Corporation, Pittsburgh Steel Company and Crucible Steel Company of America. *See United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S. D. N. Y. 1958). In addition, petitioners include only three of the total of some 3,000 companies which operate iron or steel foundries (App. 67a-68a). United States Steel Corporation, which had 31% of the nation's ingot capacity as of 1954 (R. 2307a-2308a), is a party only in respect of its plant at Geneva, Utah, which accounted for approximately 1½% of such capacity.

C. The Nature of Petitioners' Alleged Violations

The Commission's primary purpose in bringing this proceeding was, in its words,

> ". . . to arrest in their incipiency acts and practices which, if allowed to continue, would eventually produce a monopoly in the respondent Luria. . . . The potential monopolizer at which the complaint is primarily aimed is respondent Luria." (App. 45a-47a).

The Commission's charges against petitioners were interpreted by the Hearing Examiner to consist of,

> (1) a charge of conspiracy among them and Luria to create a monopoly in Luria in the sale of steel scrap; and
>
> (2) a charge that the separate and independent dealings between each petitioner and Luria constituted illegal exclusive dealings.

With respect to the first charge, the Hearing Examiner dismissed the complaint at the end of the case-in-chief on the ground that,

> " . . . the record does not establish the existence of any overall agreement, conspiracy, understanding, or combination among the respondent steel companies or any other steel companies . . . to deal with the Luria respondents . . ." (R. 1979a; see also R. 2198a).

The Commission affirmed that dismissal.

> "There is no substantial evidence to support an inference that the mill respondents ever came to an expressed or tacit meeting of the minds or understanding as to purchasing from Luria." (App. 55a).

With respect to the second charge, *i.e.*, that the dealings between each petitioner and Luria constituted illegal exclusive dealings, the Hearing Examiner found that the relations between each petitioner and Luria,

> " . . . cannot be classified as legally binding contracts. They do not, obviously, have a number of the basic features of a normal long-term supply contract . . . The only binding contracts are the individual orders, after acceptance by Luria, . . . the terms of these may vary from order to order. . . . [and] the relationships are terminable at will. . . ." (R. 2625a).

He found, nevertheless, that these relationships were "arrangements" to deal exclusively with Luria, and that,

> " . . . the principal factor in Luria's rise in recent years has been the series of exclusive arrangements which it has had with a number of the domestic mills. It is these arrangements at which the complaint is primarily directed. . . . Pursuant to these arrangements a number of the mills have bought substantially all of their scrap from Luria and its subsidi-

> aries, while others have bought from the Luria organization substantially all of their brokerage scrap, such scrap constituting the bulk of their scrap purchases in most instances". (R. 2621a).

From that premise, the Hearing Examiner concluded that,

> ". . . Since the arrangements between Luria and the mills are of the type covered by Section 3 [of the Clayton Act] or are at least economically equivalent thereto . . . the buyers may be held accountable under Section 5 of the Federal Trade Commission Act . . ." (R. 2643a).

The Commission considered the exclusive dealing charge as "directed against incipient Sherman Act violations" (App. 55a) rather than violations of § 3 of the Clayton Act, as the Hearing Examiner had concluded (R. 2702a). The two-man majority decided,

> ". . . that there exists between Luria and each mill respondent an agreement, understanding, combination and conspiracy pursuant to which Luria supplies each of the mills with all or substantially all of its needs of scrap. The effect of these arrangements is to exclude competing scrap sellers from a substantial market and thus each of the agreements constitutes an unlawful conspiracy". (App. 59a-60a).

A further reason for the joinder of petitioners to these proceedings was, in the Commission's words,

> ". . . . because an order to cease and desist which did not include mill respondents would be ineffective." (App. 47a-48a).

On those bases, the Commission issued an Order (App. 116a-121a):

> (a) prohibiting each petitioner from
>
> (i) purchasing all or substantially all of the annual scrap requirements of any plant or plants from Luria, and
>
> (ii) giving Luria preferred status or treatment; and
>
> (b) directing each petitioner, for five years, to purchase from suppliers other than Luria at least 50% of the annual requirements of any plant or plants for purchased scrap, except to the extent that adequate supplies are not available from other suppliers on comparable terms.

The court below, in affirming the Commission's order, adopted the Commission's rationale that the charges against petitioners were directed against possible incipient Sherman Act violations by Luria (App. 18a, 21a).

> "[The Commission's purpose in the instant proceeding] was to open the market to Luria's competitors who consist of other broker-dealers whose economic livelihood is directly affected by the size of the market freed from monopolistic control." (App. 17a).

The court below held that petitioners violated § 5,

> "... by separate agreements whereby each mill made Luria its exclusive or substantially exclusive broker." (App. 4a).

D. Petitioners' Purchases from Luria

As of 1954 (the most recent year for which the record affords full information), each petitioner, with a single ex-

ception, dealt with Luria solely on the basis of individual purchase orders without any contract or other commitment to continue to make such purchases (R. 2625a).* Such course of dealing was completely "terminable at will". *Ibid.*

Petitioners, in dealing with Luria, followed practices almost as varied as their number. Dealings between each petitioner and Luria differed not only from company to company but also from plant to plant within a single company. There was also a wide variation in the percentage of scrap which each petitioner purchased from Luria.

For example, Bethlehem's five eastern plants purchased only 50.9% of their scrap from Luria in 1954 but such purchases consisted of over 845,000 tons (R. 5629a). Edgewater, Baldwin-Lima-Hamilton, Detroit, Phoenix and Columbia Malleable, on the other hand, purchased over 95% of their scrap from Luria in 1954, but their purchases from Luria in tons were but a small fraction of Bethlehem's total (R. 5651a, 5621a, 5650a, 5625a, 5649a). One Bucyrus-Erie plant purchased substantially all of its scrap from Luria, a second plant approximately 50%, while a third plant, which consumed more scrap than the other two combined, purchased less than .05% of its scrap from Luria (R. 5640a-5642a).

Each petitioner has had a satisfactory experience with Luria in terms of quality of scrap, adherence to delivery schedules and general effectiveness as a broker. The record is replete with uncontradicted testimony that each petitioner

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*The only exception was a partial requirements contract entered into between Bethlehem and Luria in connection with the construction and equipping of a scrap preparation yard adjacent to Bethlehem's Los Angeles plant (R. 5181a-5181a-8). That contract expired on February 12, 1963. CF&I entered into a five-year contract with Luria with respect to its plant at Pueblo, Colorado, but that contract was terminated the following month (R. 5168a, CX 192, 2293a-2296a).

dealt with Luria because each was completely satisfied with its performance.*

REASONS FOR GRANTING THE WRIT

Summary of Argument

This case raises important questions respecting the basic power of the Commission and the fundamental fairness of its procedure. The Commission and court below have rendered a decision which, in part, conflicts with decisions of this Court and several courts of appeals on the same subject matter and which, in part, raises important and novel questions of federal law which have not been, but should be, settled by this Court. Moreover, the procedure and methods adopted by the Commission, and affirmed by the court below, represent such a departure from the accepted and usual course of an administrative proceeding as to make necessary the exercise of this Court's power of supervision.

The Commission and court below have held that petitioners are liable under § 5 because they purchased scrap from Luria. It is clear, however, that such purchases were made by each petitioner because, in the independent judgment of each, Luria gave the best performance. It is also clear that petitioners were neither contractually bound to Luria, nor economically coerced to purchase from Luria, nor were engaged in a conspiracy to purchase from Luria.

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*See, for example, the testimony of Bethlehem's purchasing agent, quoted by the hearing examiner (R. 2259a) that Bethlehem selected Luria because it was "the most satisactory performer" (R. 386a). To the same effect, see testimony concerning Phoenix (R. 882a); Lukens (R. 903a, 909a); Baldwin-Lima-Hamilton (R. 940a); Columbia Malleable (R. 978a-980a); Bucyrus-Erie (R. 1403a); Granite City (R. 5916a); Detroit (R. 1272a-1273a, 1247a, 1281a); Edgewater (R. 1353a, 1359a); National (R. 1404a); CF&I (R. 1471a-1473a, 2062a-2063a, 2065a-2066a); U. S. Steel (R. 2133a); and McLouth (R. 1445a).

In no previous case under any antitrust law has liability been imposed on purchasers who, independently and without collusion, bought a good part of their requirements from the same supplier. Nor has liability ever been imposed as a result of exclusive dealing which, on the purchaser's part, was entirely voluntary and terminable at will.

Moreover, the Commission and court below erred in declaring the perfectly lawful individual purchases of each petitioner unlawful because of their effect in the aggregate on Luria's market position. Petitioners did not agree, combine or conspire to make Luria their exclusive supplier. There is, therefore, no basis to impose liability on all petitioners as a class. Certainly petitioners' purchases contributed to Luria's size, but so did the purchases of Luria's other customers. In no previous case under any antitrust law have purchasers been held liable on the theory that their wholly independent and otherwise lawful purchasing practices contributed to an alleged incipient monopoly.

Moreover, in the absence of any specific act or practice which even remotely could be classified as being illegal, the Commission and court below were in error to include petitioners in a prospective order against Luria—thus circumscribing their business freedom—simply because such inclusion might make a possible order against Luria more effective.

This disregard for petitioners' rights is even more shocking upon a consideration of the terms of the order which the Commission entered and the court below sustained. That order is unduly vague, and, in its application to some petitioners, is punitive. Nor does it appear that the order is even relevant today. The evidence upon which it is based is now over 14 years old and can hardly be characterized as being "reasonably current". Substantial changes have occurred in both the steel and scrap industries while this case was being litigated, yet, the record before

this Court contains not one iota of evidence about the effect of those changes on present competitive conditions, or the possible effect that the Commission's order will now have.

For these reasons the judgment and order of the Commission and court below, the novel questions of federal law and the clear departures from prior practice upon which they are based, should be reviewed by this Court.

I

PETITIONERS' COURSE OF DEALING WITH LURIA DID NOT VIOLATE THE CENTRAL POLICY OF ANY ANTITRUST LAW. THE COURT BELOW THUS HAD NO BASIS FOR HOLDING THAT SUCH A COURSE OF DEALING WAS ILLEGAL UNDER SECTION FIVE OF THE FEDERAL TRADE COMMISSION ACT.

A. The Legality of Exclusive Dealing as Possible Incipient Violations of the Sherman Act is Governed by the Central Policy of § 3 of the Clayton Act.

The legality of exclusive dealing as they may constitute possible incipient violation of the Sherman Act is expressly governed by the central policy of § 3 of the Clayton Act. Logic, precedent and the relevant legislative history of the statutes involved make clear that the policy of § 3 supersedes the vague language of § 5 with respect to exclusive dealing arrangements.*

See, e.g., Handler, *Antitrust Policymaking*, 76 Yale L. J. 92, 95 (1966):

". . . Congress, after mature and careful deliberation in 1914, was unwilling to leave the legality of exclusives to the uncontrolled discretion of the Federal Trade Commission, but specifically legislated on the problem in Section 3."

See also Report of the Attorney General's Committee to Study the Antitrust Laws 148 (1955); Oppenheim, *Harmonization of Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 17 *A. B. A. Antitrust Section* 231, 257 (1960); Rahl, *Does Section 5 of the Federal Trade Commission Act Extend the Clayton Act?*, 5 Antitrust Bull. 533 (1960).

In *FTC* v. *Eastman Kodak Co.*, 274 U. S. 619 (1927), this Court expressly considered the extent to which the specific policy of the Clayton Act limits the Commission's discretion under § 5. The Commission found that Kodak's acquisition of the assets of three film laboratories violated § 5 and ordered divestiture. The Court held that since § 7 of the Clayton Act, which governed the legality of acquisitions, did not then provide for the divestiture of acquired assets, as opposed to stock, the Commission lacked power to attack an acquisition of assets under § 5.

The principle of *Kodak* was recently considered and followed in *Grand Union Co.* v. *FTC*, 300 F. 2d 92 (2d Cir. 1962). The issue in *Grand Union* was whether § 5 could be used to prohibit a buyer from knowingly participating in practices condemned by section 2(d) of the Robinson-Patman Act even though 2(d) by its terms applies only to sellers.

The court recognized that § 5 authorized the Commission to arrest in their incipiency practices which might violate the policy of the Clayton Act and to apply Clayton Act proscriptions to parties not subject to the Act if the Congressional omission was "inadvertent" and not intentional. But the Court emphasized that where a practice is of the general type covered by the Clayton Act, § 5 could not be used to prohibit what Congress has studiously and purposefully sanctioned. As an example, the court stated that the Commission had no power under § 5 to prohibit exclusive dealing arrangements that were not prohibited by § 3 of the Clayton Act (300 F. 2d at 98).

Grand Union thus accords with the holding in *Kodak* that the Commission is not free to formulate legislative policy by "legislating a 'new antitrust prohibition' ". *Ibid.* The Commission may, in its discretion under § 5, attack anticompetitive practices before their impact is full blown,

and may, in certain cases, prohibit additional parties from engaging in the proscribed behavior, but it cannot rewrite the law enacted by Congress.

This distinction is important. The Commission's administrative expertise can profitably be employed to ascertain when a practice's effects are likely to result in a violation of law. On the other hand, the determination of whether any particular practice should be subject to proscription involves the balancing of many conflicting social policies for which the broad viewpoint and investigatory power of Congress is necessary.

In the present case, the Commission has departed from the express terms and basic policy of § 3 in two respects. First, the Commission has held petitioners liable even though § 3 applies only to suppliers. Second, the Commission has attacked petitioners' purchases from Luria even though each petitioner was contractually and economically free to terminate them at any time. While § 5 admittedly is broad, it is not so broad that it authorizes the Commission to legislate a new substantive antitrust violation.

Prior to this case, no court has ever imposed liability upon a purchaser who may have engaged in exclusive dealing (absent a horizontal conspiracy). This result was so because Congress clearly intended § 3 to apply only to suppliers. During the debates on § 3, Senator White declared:

> "The Senator from Mississippi asks why I exclude . . . the purchaser, lessee or licensee. In the first place, the section is to protect the purchaser, the lessee, or the licensee, and we do not care to punish the man we are intending to protect." 51 Cong. Rec. 14599 (1914).

Can the legislative history of § 3 now be ignored and the Commission be permitted, simply by evoking the magic

words "Section 5", to impose liability where Congress has purposefully and studiously elected not to impose liability? And if so, how far does its power extend? Are there any mitigating circumstances to such liability? The court below dismissed petitioners' argument that their valid business purpose was a defense. Does this mean that every industrial consumer who may purchase exclusively from one supplier violates § 5?

The imposition of liabilty upon buyers opens new areas of confusion and uncertainty in our antitrust laws which this Court should examine and clarify.

This case is also the first in which liability has been imposed with respect to alleged exclusive dealing which was not founded upon contract or induced by economic coercion. The central policy of § 3 is to protect the freedom of purchasers to shift their patronage at any time, and the vice condemned is not the *practice* of dealing exclusively, but the *compulsion* to do so. Indeed, the right of purchasers to deal freely with the supplier that provides the best offer and service is the very essence of competition. By restricting such freedom, the Commission and court below actually frustrate the policy of § 3.*

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*This is clear from the legislative history of § 3. Thus, Congressman Floyd, a member of the House Judiciary Committee which reported out the bill subsequently enacted as § 3, gave as an example of illegal exclusive dealing the situation where,

> ". . . a manufacturer goes to a merchant in a town and agrees with him that . . . he will handle his goods exclusively and enter into a contract that he will not handle the goods of any other competitor in his line of business . . . ."

but noted that,

> ". . . unless he makes this exclusive contract there is nothing to prevent a manufacturer dealing exclusively with one person or one person dealing exclusively with one manufacturer." 51 Cong. Rec. 9161 (1914).

The right under the antitrust laws to deal exclusively in the absence of contractual compulsion or economic coercion has been repeatedly affirmed. In *Standard Oil Co.* v. *United States,* 337 U. S. 293 (1949), for example, this Court expressly recognized the right of purchasers to deal exclusively with a single supplier so long as there was no barrier which prevened them from turning at any time to a competing supplier. This Court carefully explained:

> ". . . If in fact it is economically desirable for service stations to confine themselves to the sale of the petroleum products of a single supplier, they will continue to do so though not bound by contract, and if in fact it is important to retail dealers to assure the supply of their requirements by obtaining the commitment of a single supplier to fulfill them, competition for their patronage should enable them to insist upon such an arrangement without binding them to refrain from looking elsewhere." 337 U. S. at 313-314.

Applying the same principle in *Dictograph Products, Inc.* v. *FTC,* 217 F. 2d 821 (2d Cir. 1954), *cert. denied,* 349 U. S. 940 (1955), the Second Circuit wrote:

> "It may well be that, after the removal of the prohibited clauses, many if not most of petitioner's distributors will voluntarily prefer to deal exclusively with the 'Acousticon' hearing aid and its parts and accessories. If it possesses the virtues extolled by the petitioner's witnesses, there would seem to be sound business reasons for believing that this will be so. But if others, whose clientele may not be composed of so many people of means, desire to take on the products of other manufacturers which command a lower price, even if not of so superior a quality in

> appearance or performance, and also to sell used instruments which have been traded in or otherwise obtained, the result will be the very result intended by the framers of the statute." 217 F. 2d at 829.

The Commission and court below ignored these authorities, and again, allowed the magic words "Section 5" to become the progenitor of a new substantive antitrust violation.

In so doing, the court below relied heavily on this Court's decisions in *FTC* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392 (1953) (*"MPAS"*), and *FTC* v. *Brown Shoe Co.*, 384 U. S. 316 (1966). Neither of those decisions, however, is apposite.

In *MPAS*, this Court held that exclusive dealing arrangements might violate § 5 even if they related to bailments and not to the "lease, sale or contract for sale" covered by § 3. This Court also suggested that the Commission could reach under § 5 practices which violated the policy of § 3 but which were sufficiently incipient not to constitute a substantial lessening of competition or a tendency towards monopoly. That latter suggestion was the basis for this Court's decision in *Brown Shoe* that exclusive arrangements were not free from attack under § 5 merely because the standards of *competitive impact* of § 3 had not yet been met.

Neither decision, however, suggests that the Commission might, as here, formulate new policies and prohibit activities fully consistent with the purposes of § 3. As this Court recognized in *Brown Shoe*, the "central policy" of § 3 is to prohibit "contracts which take away freedom of purchasers to buy in an open market". 384 U. S. at 321. In both *MPAS* and *Brown Shoe*, the Commission was attacking those kinds of contracts. In *MPAS* the bailees were bound for five years not to accept films from other suppliers.

In *Brown Shoe* there were contracts limiting retailers from purchasing from other suppliers and economic coercion to deal exclusively by Brown Shoe's economic power and threats to withdraw benefits. On such facts, the exclusive arrangements clearly violated the "central policy" of § 3; accordingly, § 5 could properly be employed even though a bailment rather than a sale was involved and even though the competitive impact of the arrangement was not yet full blown.

Both *MPAS* and *Brown Shoe* are thus fully consistent with the rule that § 3 furnishes the basic guidelines as to the kinds of exclusive dealing arrangements that may be considered unlawful under § 5. Nothing in *MPAS* or *Brown Shoe* supports the the Commission's present attempt to employ the incantation "Section 5" to depart from the basic framework of § 3.

The Commission's exercise of legislative power was not only improper, but unwise. In sanctioning such exercise of power the court below erred. In doing so it disregarded the legislative history and policy of § 3 as well as the decisions of other circuits. The novel principle which it announced threatens to unsettle important rights not only of petitioners but of many others similarly situated and to create confusion of untold magnitude. A writ of certiorari should issue to permit this Court to fully review the scope and implications of the new substantive liability which the Commission and court below have created.

B. Even if the Commission Is Not Bound by the Central Policy of § 3 of the Clayton Act, It Was Still Error for It and Court Below To Hold That Petitioners' Independent Purchases from Luria Violated § 5 As Incipient Violations of the Sherman Act.

The court below concluded that petitioners' independent and uncoerced purchases contributed to Luria's al-

leged incipient monopoly and hence violated § 5. As already noted, no court has ever gone so far in permitting the Commission to protect competitors at the expense of competition. See *FTC* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 313 (1934). The central policy of the Sherman as well as the Clayton Act is the protection of freedom to shift patronage at will. *FTC* v. *Brown Shoe Co., supra,* at 321. It is undisputed that petitioners in fact retained that freedom. It is the Commission by its proposed order, rather than Luria, which seeks to take away that freedom.

"Restraint of trade" presumes that someone's freedom to trade competitively has been restricted. Since petitioners remain free to deal with whomever they choose, shifting either part or all of their patronage at any time, no restraint of free trade could possibly result. Nor does the Commission or court below suggest how such a course of dealing might result in a trade restraint in the future.

Equally troubling is the Commission's assertion of an incipient monopoly. The Commission asserted that Luria has "the power to exclude . . . competitors from the market which the mill respondents constitute." (App. 74a) Without further elaboration the Commission asserted,

> "While this monopoly power may exist, as the mill respondents contend, at their sufferance, it is nonetheless monopoly power and unlawful." *Ibid.*

Monopoly in the air is not enough. The essence of monopoly power is the power to control prices and exclude competitors in a given market. The market with which the Commission was concerned involved the mills on the one hand and scrap broker-dealers on the other. A seller's alleged monopoly which exists "at the sufferance" of his customers is no monopoly at all. Nor would petitioners have any business interest to serve by entering into agreements

giving their supplier monopoly power. Yet, regardless of their intent, it is impossible that the courses of dealing here considered could confer such power. Any attempt by Luria to raise prices could be defeated by a shift of patronage. And with petitioners always free to deal with whomever they choose, Luria could not effectively control entry into the market. In *United States* v. *Pullman Co.*, 64 F. Supp. 108 (E. D. Pa. 1945), *aff'd*, 330 U. S. 806 (1947), the court was concerned with the appropriate relief to grant after having found Sherman Act violations. The court emphasized:

> ". . . If there is only one store in a town at which everyone trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable. So here. If the railroads who are the ones responsible for providing sleeping car service can take or leave Pullman assistance to that end, there is no objection to the fact that most of them may prefer to employ the Pullman concessionaire." 64 F. Supp. at 112.

In holding to the contrary, the court below affirmed the Commission's attempt to protect Luria's competitors from the very competition that the Sherman Act was intended to preserve. It also created novel doctrine which this Court should review and clarify.

II

SINCE THE INDIVIDUAL COURSES OF DEALING BETWEEN LURIA AND PETITIONERS WERE LAWFUL, THE COMMISSION AND COURT BELOW HAD NO JUSTIFICATION FOR HOLDING PETITIONERS LIABLE UNDER § 5 ON THE THEORY THAT THE AGGREGATE EFFECT OF SUCH DEALING ENHANCED LURIA'S MARKET POSITION

The Commission and court below concluded that, irrespective of the legality and competitive effect of each independent course of dealing between each petitioner and Luria, the competitive effect of all them in the aggregate justified the imposition of liability against petitioners under § 5 because they contributed to and enhanced Luria's alleged incipient monopoly.

This was sheer error. Each petitioner's course or dealing with Luria was not illegal standing alone. They thus do not suddenly become illegal because of their aggregate effect on Luria's market position. The single case cited by the Commission in the court below to support this novel principle of "liability through aggregation", *Hershey Chocolate Corp.* v. *FTC,* 121 F. 2d 968 (3d Cir. 1941), involved a horizontal conspiracy. Here the Commission has expressly found that a horizontal conspiracy was not present.

In the absence of any conspiracy or concerted action among petitioners, there is no legal justification whatever to impose liability on petitioners because of the aggregate effect of their purchases. If petitioners violated the law because their purchases, however small, had the effect of enhancing Luria's market position, then under this theory, all of Luria's customers should be held to violate § 5 because their purchases also enhanced Luria's market position and contributed to its alleged incipient monopoly.

Consider, for example, the purchases of petitioner CF&I. Because of the location of its plant in Pueblo,

Colorado, the only steel mill in the area, CF&I dealt with Luria because Luria was the only broker that was willing to service its scraps needs. (R. 2293a).

Consider also the purchases of Petitioner Edgewater. Its annual purchases from Luria never exceeded .005% of the scrap purchased in its relevant market (R. 5861a-5862a). Nevertheless, the court below held:

> "We cannot separately view individual purchases by those mills whose annual requirements are not quantitatively significant. All contribute to the unlawful result and all should share in the consequences [citing *Modernistic Candies* v. *FTC*, 145 F. 2d 454 (7 Cir. 1944)]". (App. 27a).

On the same logic, every industrial consumer might be liable for buying a product manufactured by Alcoa or United Shoe Machinery. Is it now illegal for any consumer to purchase from an alleged monopolist or an alleged incipient monopolist? Is it now incumbent upon a consumer to find out (and in the process perhaps violate other antitrust laws) how many other buyers are purchasing from his supplier?

In *Modernistic Candies* v. *FTC*, 145 F. 2d 454 (7th Cir. 1944), the only authority cited by the court below for this novel proposition, the court found that the merchandising of "ballgum boards" constituted gambling activity and held that the Commission could enjoin the manufacturers and distributors of such devices since such parties "deliberately and designedly aid and abet . . . practices contrary to public policy." (145 F. 2d at 455). By citing this case, is the court below suggesting that a customer who buys a good part of his scrap requirements from the best and most reliable supplier is *in pari materia* with a manufacturer of gambling devices?

That *Modernistic Candies* is the only authority cited by the court below to sustain the inclusion of petitioners in this proceeding is revealing. Contrary to the decision below, at least one federal court has said:

> "... I do not think that it has ever been held that merely having business dealings with a monopolist, even with knowledge of the existence of the monopoly, is sufficient to convict anyone of a violation of the [Sherman] Act. Ordinary suppliers and customers are not compelled to boycott a monopolistic business under pain of prosecution." *Lawlor* v. *National Screen Service Corp.*, 1955 Trade Cas. ¶ 68,216 at 71,008 (E. D. Pa).

Lawlor is particularly apposite for there, as here, customers of an alleged monopolist were joined as defendants on the theory that their purchases contributed to the alleged monopoly and the complaint was dismissed as to them.

The decision below thus expounds novel law. A writ of certiorari should issue so that this Court may correct or at least clarify the outer limits of such a manifest departure from prior practice.

III

SINCE THE COMMISSION AND COURT BELOW COULD DEVISE NO VIABLE LEGAL THEORY TO HOLD PETITIONERS LIABLE UNDER § 5, THE COMMISSION'S ORDER AGAINST PETITIONERS MUST BE VACATED.

It is axiomatic that petitioners cannot be found to have violated § 5 simply because the Commission says so. The

Commission has been given broad discretion; but it has not been, and could not be, given unbridled discretion to impose liabilty and enter an order without first establishing that there has been a violation of law.

In the present case any certainty concerning what the Commission's decision means is lacking and has not been clarified by the court below. The Commission has asserted that petitioner's activities contribute to an incipient monopoly and restraint of trade. But as to how or why the independent, uncoerced and freely terminable purchasing practices here challenged could cause such monopoly or restraint of trade, the Commission was silent. Similarly, the Commission gives no indication why it disregards the apparent expression of congressional intent in § 3. In his dissenting opinion Commissioner Elman accurately observed,

> "A major problem with the majority opinion, as I read it, is that one cannot be sure of the precise theory on which the case is being decided. Like the complaint, the opinion is liberally sprinkled with references to 'agreements', 'understandings', 'combinations', 'conspiracies', 'unfair practices', 'incipient monopoly', 'exclusive dealing arrangements', and other familiar antitrust war-horses. But—and it may be that this is a subjective reaction that will not be shared by others—in the majority opinion these old and faithful warriors seem not to be marching progressively in a straight and unwavering line towards a clearly defined objective but to be rambling over the field, moving uncertainly in several loosely-drawn lines and in various different directions at the same time. As a result, one cannot speak with absolute assurance of the theory of the majority opinion." (App. 108a).

As Commissioner Elman recognizes, an ultimate conclusion ("unfair competition") cannot be supported merely by equally conclusional findings of "conspiracies", "incipient monopoly", and "exclusive dealing arrangements".

Thus, in the absence of any viable finding of liability, the Commission's order cannot stand. That petitioners' presence in this proceeding may make a possible order against Luria more effective offers no justification for abridging their business judgment and freedom.* Moreover, such an assertion of power squarely conflicts with the very bases of our democratic and constitutional government. Justice Douglas has timely warned,

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*The manifest injustice of enforcing the Commission's order against petitioners without a viable finding of liability becomes even more apparent upon a consideration of its terms. The order compels each petitioner not to purchase more than 50% of the scrap requirements of any of its plants from Luria for a period of 5 years. The 50% requirement has no justification in the record, is not related to the alleged unlawful practices found to exist, works an undue hardship on those petitioners which, because of their location, cannot find suitable alternative suppliers and represents a novel departure from any other order ever entered by the Commission.

The order also prohibits each petitioner from making Luria its "exclusive or substantially exclusive" scrap supplier. This prohibition is unreasonably vague. Because of the wide disparities in the purchasing practices of each company, even on a plant to plant basis, it is impossible to ascertain exactly what the Commission means by "exclusive or substantially exclusive".

In refusing to compel the Commission to clarify its order, the court below said: "The order, *when interpreted in light of the record,* is clear and not subject to attack. . . ." (App. 25a) (Emphasis supplied). This massive and jumbled record only adds confusion, not clarity, to the meaning of the order. For the court below to require petitioners to obtain advice under the Commission's Rules of Practice (App. 25a, 26a) will simply require petitioners to submit to the demands of the Commission under risk of contempt. It was precisely for this reason that this approach was flatly rejected in *Joseph A. Kaplan & Sons, Inc.* v. *FTC*, 347 F. 2d 785, 788-791 (D. C. Cir. 1965), a decision cited to but ignored by the court below. The decision below thus conflicts with a decision of another circuit.

> "Unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty." *New York* v. *United States,* 342 U. S. 882, 884 (1951) (dissenting opinion).

IV

THE COMMISSION'S ORDER MUST BE VACATED BECAUSE IT IS BASED ON A STALE RECORD.

The court below had the responsibility not only to affirm or set aside the order of the Commission, but also to determine whether to exercise its equity powers and "issue its own order" of injunction. *NLRB* v. *Kingston Cake Co.,* 206 F. 2d 604, 611 (3d Cir. 1953). Courts of equity have steadfastly refused to issue injunctive orders on the basis of stale evidence. The evidence in this case covers mainly the period 1945 to 1954 and the market statistics cover only the years 1947 to 1954. After 14 years, such evidence is obviously too stale to support a prospective order.

This fact was first recognized by Commissioner Elman when he stated in his Dissenting Opinion (written in 1962):

> ". . . the Commission's order, based as it is upon events of nearly a decade ago, has little relevance to present conditions in the scrap market. As already noted, the period covered by the complaint was a sellers' market in which the mills had a clear interest in purchasing through a single broker. It is common knowledge that in recent years, however, the steel industry has been characterized by produc-

> tion falling far short of capacity. Whether, and how, this has affected the competitive situation today in the market for scrap is something on which the record sheds no light. And, similarly, the extent to which elimination of Luria's 'monopolistic' position (assuming it still exists today) in the scrap business will have practical benefits for the public is a matter for conjecture." (App. 114a-115a).

Commissioner Elman's comments are even more cogent today, after an additional six years have passed.

The court below, however, brushed aside the obvious staleness of this record with the comment: "We have before us a thorough exposition of the *permanent* conditions in the scrap brokerage industry" (App. 33a) (Emphasis supplied). This was sheer error. While the economic and technological conditions of any industry rarely remain "permanent" over a 13 to 22-year period, the changes that have occurred in the steel and scrap industries since 1954 are especially striking. Since 1954, the unique seller's market that existed during the Korean War has changed, competition from foreign production has increased, and steel making itself has changed. The most notable change has been the increased use of the basic oxygen furnace, which has resulted in a lessened need and hence market for scrap. Indeed, Commissioner Elman in a footnote to his Dissenting Opinion cited authoritative statistical evidence to demonstrate certain broad market changes which have occurred in the steel industry since 1954 and which he called a matter of "common knowledge" (App. 115a). However, the record contains no inkling of what effect such changes have had on competitive conditions in the scrap market, or of what effect the Commissioner's Order will have in today's market.

Particularly where, as here, an unusually harsh and sweeping order is entered, the Commission and the courts have a particular responsibility to determine whether present conditions require it.

This Court recently held that a prospective order of an administrative agency must be based on a "reasonably current" record. *American Committee* v. *Subversive Activities Control Board,* 380 U. S. 503 (1965). Other courts of appeal have consistently refused to issue orders of enforcement under circumstances less aggravated than those of the present case. Thus in an opinion vacating an FTC order, the Fourth Circuit held:

> "It appears that the order before us was entered twelve years after the proceedings before the commission were commenced and more than six years after the last evidence was taken therein. It was entered more than ten years after the transactions disclosed by the evidence . . . upon which the proceeding was largely based. . . .
>
> "Under these circumstances, we think it clear that the order of the commission should be vacated. Such orders are entered, not as punishment for past offenses, but for the purpose of regulating present and future practices. 15 U.S.C.A. § 45 (a)(b); American Chain & Cable Co. v. Federal Trade Comm., 4 Cir., 142 F. 2d 909, 911. . . . Where the injunctive power of the court is exercised for the enforcement of an administrative order, the order must be appropriate for present enforcement. See N.L.R.B. v. Eanet, 85 U.S. App. D.C. 371, 179 F. 2d 15, 21; N.L.R.B. v. Norfolk Shipbuilding and Dry Dock Co., 4 Cir, 172 F. 2d 813, 815-816.
>
> "While an administrative agency is not a court of equity, its orders must be based on evidence giv-

> ing them reasonable support, and such support is not given for an order relating to present and future practices by evidence relating only to transactions which occurred a decade before it was entered." *New Standard Pub. Co* v. *FTC*, 194 F. 2d 181, 182-183 (4th Cir. 1952).

See also *NLRB* v. *Eanet*, 179 F. 2d 15, 21 (D.C. Cir. 1949) ("entries of decrees unrelated to present reality is not countenanced by our jurisprudence").

In sustaining the Commission's order the court below again is in conflict with the decisions of this Court as well as the courts of appeal of other circuits.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

May 24, 1968

Respectfully submitted,

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